IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY,
Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Petrol Stops Northwest, Gas-A-Tron of Arizona, and Coinoco respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari of Douglas Oil Company (hereinafter referred to as "Douglas") and Phillips Petrol Company (hereinafter referred to as "Phillips") seeking review of the Ninth Circuit's affirmance of the decision of the United States District Court for the Central District of California granting Petrol Stops, Gas-A-Tron of Arizona, and Coinoco the same right of access to the grand jury materials received by Douglas and Phillips prior to their nolo contendere pleas to the California District Court grand jury indictments for violating the antitrust laws by engaging in the same conduct alleged by Petrol Stops, Gas-A-Tron of Arizona and Coinoco in civil antitrust actions in the United States District Court for the District of Arizona — Tucson.

OPINIONS BELOW

The March 20, 1978 opinion of the United States Court of Appeals for the Ninth Circuit is unofficially reported at 1978-1 Trade Cas. ¶61,935 (9th Cir. 1978) and appears in Appendix A hereto at pages A-1 through A-8. The May 17, 1977 Order of the United States District Court for the Central District of California (the Honorable William P. Gray presiding) appears in Appendix B hereto at pages B-1 through B-3.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether this Court should review the Ninth Circuit's decision correctly implementing the twenty year old rule, that upon demonstration of a particularized need and where the opposing party to a civil action has already been given the grand jury materials access may be granted to those grand jury materials in the sound discretion of the District Court in which the indictments were returned and nolo contendere pleas entered.

STATUTE INVOLVED

Federal Rules of Criminal Procedure, Rule 6(e) appears in Appendix C to this Brief hereto at pages C-1 through C-2.

STATEMENT OF THE CASE

This proceeding concerns the grand jury transcripts and documents obtained by attorneys in the Antitrust Division, United States Department of Justice, pursuant to subpoenas to Douglas and Phillips during the course of a criminal antitrust case — *United States v. Phillips*

Petroleum Company, et al., Crim. No. 75-377 MML (C.D. Cal. 1975). The California District Court concluded this criminal case against petitioners Douglas and Phillips by disbanding the grand jury, accepting nolo contendere pleas from Douglas and Phillips, and entering a consent decree enjoining further blatant price fixing of refined petroleum products in the western United States. The California District Court then granted respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's request for access to the same grand jury materials already made available to petitioners Douglas and Phillips, subject to a protective order limiting disclosure to Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's attorneys, prohibiting further copying, limiting the use of the evidence to impeachment, refreshing recollection, testing credibility, and requiring the return of the materials after conclusion of the private actions. Douglas and Phillips had obtained access to these grand jury materials during their criminal prosecution and nolo contendere plea process but without a similar limiting protective order. The Department of Justice had no objection to the disclosure of grand jury materials to respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco and so represented to the California District Court. Douglas and Phillips opposed the disclosure to respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco arguing that the grand jury materials were not relevant to respondents' private antitrust actions filed in Arizona in spite of the fact that Douglas and Phillips have made use of the transcripts in defending the private civil actions. Both lower courts rejected the relevancy argument of Douglas and Phillips.

A. *The Indictment and Respondents' Civil Antitrust Actions Against Douglas and Phillips*

Prior to the March 19, 1975 indictment of Douglas and Phillips for violation of the Sherman Act, 15 U.S.C. §1, Petrol Stops, Gas-A-Tron of Arizona, and Coinoco, independent marketers of refined petroleum products, filed two separate private antitrust actions in the United States District Court for the District of Arizona — Tucson against a number of major oil companies, refiners, and wholesale marketers, including Douglas and Phillips. The allegations in the two actions were similar except that one action, *Gas-A-Tron and Coinoco v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, concerned antitrust violations in Arizona and the other, *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, alleged similar violations of the antitrust laws in the three West Coast states of Washington, Oregon, and California. In their private actions, respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco claim, *inter alia*, that Phillips, Douglas, and other co-conspirator defendants had violated Sections 1 and 2 of the Sherman Act by combining and conspiring among themselves and with other co-conspirators to raise, fix, and stabilize the wholesale and retail rebrand price of gasoline sold in Washington, Oregon, California, and Arizona. In both private antitrust actions the respondents claimed that certain major oil companies, including petitioners Douglas and Phillips, had combined and conspired to eliminate competition of independent or rebrand marketers,[1] including Petrol Stops, Gas-A-Tron of Arizona, and Coinoco by combining and conspiring to artificially raise, fix or stabilize the price at which these independent marketers

[1]A rebrand marketer is a marketer who purchases gasoline from a supplier such as a Gulf, Phillips, or Douglas and resells that gasoline under its own brand or no brand or a brand other than the brand of the supplier.

purchased gasoline for resale in Washington, Oregon, California, and Arizona during at least the period of November 1969 through November 1973.

The March 19, 1975 indictment against Phillips Petroleum Company, Douglas Oil Company of California, Powerine Oil Company, Fletcher Oil & Refining Company, Golden Eagle Refining, Inc., MacMillan Ring-Free Oil Company, Inc. charged that these defendants, and various other corporations, firms, and individuals made coconspirators in the indictment, had combined and conspired, beginning at least as early as July 1970 and continuing up through 1971, to "increase, fix, stabilize, and maintain the price of rebrand gasoline" sold in Washington, Oregon, California, Nevada, and Arizona. The indictment explained that the effect of this combination and conspiracy was to raise, fix, and stabilize and maintain at artificially non-competitive levels, the price at which independent marketers were able to purchase gasoline for resale in the states of Washington, Oregon, California, Nevada, and Arizona.

The courts below found that the issues involved in the criminal case against petitioners Douglas and Phillips, *U.S. v. Phillips, supra, b*efore the grand jury and the issues in *Petrol Stops Northwest v. Continetal, supra,* and *Gas-A-Tron v. Union, supra,* are similar. (Ninth Circuit Opinion, Appendix A at pages A-2; A-7; A-8) The three cases involve the same alleged unlawful conduct in the same states during the same period of time. The California District Court went even further, as Judge Gray was willing and offered to supplement his opinion as to relevancy of the documents subpoened by the grand jury and the transcripts of the testimony of Phillips' and Douglas' employees, agents, and other individuals, by inquiring of the federal district court judges in Tucson who were pre-

siding over the *Petrol Stops Northwest v. Continental, supra,* and *Gas-A-Tron v. Union, supra,* cases in Arizona. As Judge Gray explained:

> THE COURT: I have no desire to poach on Judge Walsh's or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners (Petrol Stops, Gas-A-Tron of Arizona, and Coinoco) to have access to grand jury transcripts even though in the possession of the defendants (Douglas and Phillips), who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."
>
> I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here. (Transcript of Proceedings, March 28, 1977, Appendix B at page B-7 of Petitioners' Brief)

Petitioners Phillips and Douglas did not accept Judge Gray's offer to contact the Arizona District Court Judges to review the question of relevancy. Instead, Phillips and Douglas now impugn Judge Gray's "incentive" to spend the time and obtain additional information demonstrating that the offenses for which Douglas and Phillips were indicted and to which they plead nolo contendere are precisely the same antitrust violations, among others, described in Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's Complaints in the private Arizona actions. (Petitioners' Brief at page 12).

B. *Douglas' and Phillips' False Answers to Interrogatories and Their Employees' Contradictory Denials and Unlawful Activity*

Petitioners Douglas and Phillips filed answers to interrogatories in the Arizona civil actions that expressly contradict the findings of the grand jury and their own nolo contendere pleas, and petitioners Douglas and Phillips now seek to prevent disclosure of the impeaching grand jury materials. Douglas and Phillips argue that the California District Court Judge incorrectly concluded that these grand jury materials were relevant and necessary for Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to proceed with the Arizona civil actions with grand jury documents and transcripts indicating material misrepresentations by Douglas and Phillips. In affirming Judge Gray's decision granting limited access to the grand jury materials, the Ninth Circuit noted that further inconsistencies between the Bill of Particulars and Douglas' and Phillips' employees' recent testimony constituted an even stronger showing of relevancy and compelling necessity for Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to have the grand jury materials. Instead of addressing the substance of the conflicts between grand jury testimony and recent depositions, Douglas and Phillips attack the Ninth Circuit's concern over Douglas' and Phillips' repeated inconsistent statements under oath. (Petitioners' Brief at page 7, n. 6.)

C. *The Ninth Circuit's Opinion*

Douglas and Phillips appealed the California District Court's Order of May 17, 1977 granting Petrol Stops, Gas-A-Tron of Arizona, and Coinoco limited access to the grand jury materials already produced to Douglas and Phillips during the criminal prosecution. The Ninth Circuit reasoned that since the criminal case had been terminated by Douglas' and Phillips' nolo contendere pleas

that only one of the five reasons for grand jury secrecy remained. (Ninth Circuit Opinion, Appendix A at pages A-5 and A-6) This reason — "insuring untrammeled disclosure by future witnesses" was not a strong reason but must nevertheless be balanced against respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's need to obtain the truth in the Arizona civil actions. *Id.* After describing Judge Gray's careful balancing and his stringent protective order, the Ninth Circuit noted that to have denied Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's request for disclosure "might well have been an abuse (of discretion)." (Ninth Circuit Opinion, Appendix A at page A-8.)

REASONS FOR DENYING THE WRIT

A. *The Opinion of the Ninth Circuit Court of Appeals Correctly and Consistently Applies This Court's Decisions and Subsequent Opinions by Other Circuits Granting Restricted Access to Relevant Grand Jury Material Already Produced to Opposing Parties in Civil Litigation*

The California District Court and the Ninth Circuit Court of Appeals carefully applied *United States v. Procter & Gamble*, 356 U.S. 677 (1958), and *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). (Ninth Circuit Opinion, Appendix A) In the district court Judge Gray required respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to demonstrate their particularized need for the grand jury materials to ferret out the facts in the Arizona antitrust actions in light of petitioners Douglas' and Phillips' perjurious answers to interrogatories and deposition testimony. This use of grand jury materials for the purpose of impeachment or refreshing recollection was recently reaffirmed by the Fifth Circuit in *Texas v. United States*

Steel Corp., 546 F.2d 626 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3238 (1977), and the Seventh Circuit in *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1977), *cert. denied, sub nom. J. L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977). Granting both sides access to grand jury materials in the absence of any reason to continue secrecy had long been recognized in the Ninth Circuit, *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965), *cert. denied*, 382 U.S. 814 (1965). There are no inconsistencies among the decisions of this Court, the Circuits, and the Ninth Circuit's opinion in this case, which Douglas and Phillips now seek to overturn. Douglas' and Phillips' unsupported assertions of inconsistency between the Fifth Circuit and the Seventh Circuit ignore the holdings of these courts and that this Court considered both the *Texas* and *Sarbaugh* cases simultaneously and denied the petitions for writs of certiorari in both cases on the same day.

B. *There is no Important Question of Law Presented by the Petition for Writ of Certiorari*

No significant question requiring this Court's attention exists. Disclosure of grand jury materials pursuant to Federal Rules of Criminal Procedure, Rule 6(e) has long been left to the sound discretion of the federal district court judge. The careful exercise of that discretion by Judge Gray is apparent from reading the interlineated Order of May 17, 1977 and the Transcript of Proceedings of March 28, 1977. The Ninth Circuit analyzed Judge Gray's discretionary decision in the context of this Court's opinions and other courts' decisions. This Court should not review Judge Gray's discretion in granting respondents' request for limited access to grand jury documents and transcripts. The Ninth Circuit Court of Appeals has

already carefully performed this appellate review function. The law applied to the unique facts of this case by the Ninth Circuit Court's opinion follows the other Circuits and the rules of law established by this Court.

CONCLUSION

For the foregoing reasons respondents Petrol Stops, Gas-A-Tron of Ariozna and Coinoco respectfully submit that the Petition for a Writ of Certiorari in this case should be denied.

DATED this 26th day of May, 1978.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2305
OPINION

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, AND COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, PHILLIPS PETROLEUM COMPANY,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company,* 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests. After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggest no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery

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[1]There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute. It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with the subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

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[2]Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J. L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

We previously applied the Supreme Court's standards in *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information,

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[3]The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commisison of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Cor-porate witnesses are vulnerable to their corporate employers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for inpeachment as sufficient. *SEC. v. National Student Marketing,* 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harper & Row Publishers, Inc.,* 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient *Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc., v Globe Ticket Co.,* 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra,* recently held that a grant of acsess with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce,* 323 F.2d 233,

238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh,* 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J. L. Simmons Co. v. Illinois,* 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might

[4]We think that the Central District of California court was the proper district court to consider the issue. It was best situtaed to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh,* 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5]In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not see the materials merely for a general fishing expendition. It made a sufficient showing of particularized need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORDER
Miscellaneous
No. 5706

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S. v. Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorary William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders and adjduges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al. v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or

in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4th day of May, 1977.

William P. Gray
United States District Judge

STATUTE INVOLVED

Federal Rules of Criminal Procedure, Rule 6(e):

(1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which such disclosure has been made.

was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) *Sealed indictments.* The Federal magistrate to who an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

PROOF OF SERVICE
(by mail)

I am a citizen of the United States and a resident of the City of Salt Lake City and Salt Lake County, the State of Utah. I am over the age of eighteen years and not a party to the within action. My business address is 500 Kearns Building, Salt Lake City, Utah 84101.

On May 26, 1978, I served the above Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on interested parties in this action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Salt Lake City, Utah, address as follows:

Mr. Robert B. Nicholson
Mr. Peter de la Cruz
Appellate Section
Antitrust Division
Department of Justice
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I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 26, 1978, at Salt Lake City, Utah.

Gordon Strachan

ACKNOWLEDGEMENT CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On this 26th day of May, A.D. 1978, before me, Ann Molen, a Notary Public in and for said County and State, personally appeared Gordon Strachan known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Ann Molen
Notary Public in and for said County and State